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ELC EMPLOYMENT
RELATIONS BOARD

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RULING ON PETITION FOR
JUDICIAL REVIEW

Petitioners! Petition for Judicial Review is before the Court following hearing on May 27, 1992. The Court has had an opportunity to carefully consider the arguments and statements of counsel, and to review the written submissions of the parties and the underlying administrative record, and now rules as follows on the issues presented.

In January, 1989 the Petitioners filed state employee grievance appeals with the Public Employment Relations Board (PERB) pursuant to Section 19A.14, Iowa Code. Petitioners, longtime deputy wardens, grieved the termination of subsistence payments in lieu of housing (in the cases of Manternach and Hedgepeth) or, (in the case of Sissel) reimbursement of rent for state-owned housing.

1. Mr. Manternach has been a deputy warden at the Anamosa Reformatory since 1974. Mr. Hedgepeth has been a deputy warden at the State Penitentiary since 1972. And, Mr. Sissel has been a deputy warden/treatment director at the Anamosa Reformatory since 1968. The payments in question are variously described in the administrative record as a "housing" or "subsistence" "allowance" or "payment."

The matter was assigned to an administrative law judge for evidentiary hearing. The ALJ issued a proposed decision and order to the effect that the discontinuance of the subsistence pay in 1988 by the Iowa Department of Personnel (IDOP) violated IDOP Rule 4.5(17) dealing with "red-circled" pay rates. IDOP appealed to PERB. In a decision issued May 16, 1991 PERB supplemented the factual findings of the ALJ and found there was no violation of statute (specifically Chapter 19A) or administrative rule. Petitioners then filed the pending Petition for Judicial Review.

In order to understand the issues presented in this case, it is necessary to review the statutes pertaining to the furnishing of housing, or subsistence payments in lieu thereof, to deputy wardens as said statutes existed at the beginning of 1980 and as they changed to 1988, when IDOP ceased providing such benefits. At the beginning of 1980, Section 246.3, Iowa Code provided the warden and other employees of correctional facilities would "receive such salaries or such compensation as shall be determined by the state director [of the division of adult corrections]" With regard to dwellings for deputy wardens at the penitentiary and men's reformatory, Section 246.7, Iowa Code mandated "[e]ach deputy warden shall be furnished with a dwelling house by the state director, or house rent" Section 218.14, which applied to certain government institutions including correctional facilities, provided in general the head of each such state institution would receive, in addition to salary, a dwelling house, plus supplies and household provisions, or compensation therefor. See also Section 218.1, Iowa Code (1979). (identifying the institutions to which the chapter then applied).

None other than the institution heads were entitled to free housing under Section 218.14, and thus Section 246.7 provided the benefit only to deputy wardens at the facilities then covered by Chapter 246.

All of this began to change in 1980. Section 246.7, Iowa Code was repealed by 80 Acts, Ch. 1059, Section 3. In Section 1 of the same enactment, Section 218.14 was amended to add a second paragraph dealing with housing provided to "assistant executive heads or other employees" such as deputy wardens. New Section 218.14, which remains substantially unchanged, provided:

The division director having control over any state institution may, with consent of the commissioner of human services, furnish the executive head of each of the institutions, in addition to salary, with a dwelling house or with appropriate quarters in lieu thereof, or the division director may compensate the executive head of each of the institutions in lieu of furnishing a house or quarters. If an executive head of the institution is furnished with a dwelling house or quarters, either of which is owned by the state, the executive head may also be furnished with water, heat and electricity.

The division director having control over any state institution may furnish assistant executive heads or other employees, or both, with dwelling houses or with appropriate quarters, owned by the state. The assistant executive head or employee, who is so furnished shall pay rent for the dwelling house or quarters in an amount to be determined by the executive head of the institution, which shall be the fair market rental value of the house or quarters. If an assistant executive head or employee is furnished with a dwelling house or quarters either of which is owned by the state, the assistant executive head or employee may also be furnished with water, heat and electricity. However, the furnishing of these utilities shall be considered in determining the fair market rental value of the house or quarters.

In 1983 Section 218.1, Iowa Code was amended to remove correctional facilities from the list of institutions controlled by the Department of Human Services and Chapter 246 was amended to establish the Department of Corrections. As a part thereof, Section 246.305, Iowa Code was enacted. Section 246.305 mirrored Section 218.14 with respect to dwelling houses or other quarters furnished to the "superintendent" of each institution and other employees. As with Section 218.14, the director of the Department of Corrections was authorized to furnish the "superintendent" of each institution, "in addition to salary," with a dwelling house or other appropriate quarters, or compensation in lieu thereof. The director was also authorized to furnish such dwelling houses or other appropriate quarters to assistant superintendents or other employees. However, these employees were required to pay rent for the dwelling house or quarters. The statute contains no authority to compensate employees other than the superintendent in lieu of furnishing a house or quarters.

Section 246.3, authorizing the Director of Corrections to set the "salaries or compensation" for the warden and other employees of correctional facilities was repealed by 85 Acts, Ch. 21, Section 53.

The pertinent facts are not in substantial dispute. When Petitioners were hired they were entitled to be furnished with housing, or house rent in lieu thereof. There was no immediate change in the Petitioners' pay after the 1980 changes.

Apparently, the effect of the 1980 changes on the Petitioners here was brought to the attention of administrators by a February, 1982 memo from the Bureau of Property Management concerning employee housing rental rates. The then-director of the Division of Adult Corrections, Hal Farrier, conferred with representatives of the Merit Employment Department and the Comptroller's office and a decision was made to, in essence, continue the benefits Section 246.7 had provided for the Petitioner deputy wardens. As Petitioners correctly describe it, the decision was to "grandfather in" existing deputy wardens. Thus Petitioners Hedgepeth and Manternach continued to receive the same subsistence allowance as before, and Sissel was reimbursed for the fair rental value he now had to pay under Section 218.14 for his state-owned housing. The payments to Sissel were categorized as "Educational Differential" payments, but it is clear the arrangement was intended to continue the housing benefits he and the other Petitioners had formerly received under Section 246.7. Indeed, in each of the Petitioners' grievances they complain that they have been denied the subsistence payments (in Sissel's case, a housing allowance equal to rent) they have always received as deputy wardens. In 1988 IDOP determined there was no legal authority to continue making these payments to Petitioners, they were stopped and the underlying administrative proceedings resulted.

Petitioners first argue that notwithstanding the 1980 repeal of Section 246.7 and amendment to Section 218.14, the division director retained the authority under Section 246.3 to continue

to make housing subsistence payments to deputy wardens. The Court disagrees. With the 1980 enactments the director could furnish a free dwelling, or payment in lieu thereof, only to the head of the institution. This brings into play the well-worn rule of statutory interpretation that "expressio unius est exclusio alterius," the express mention of one thing implies the exclusion of others. See State ex rel. Miller v. Santa Rosa Sales, 475 N.W.2d 210, 218 (Iowa 1991); Holland v. State, 253 Iowa 1006, 1012, 115 N.W.2d 161, 165(1962). By authorizing the free housing, or payment in lieu thereof, only to the head of institutions, the legislature intended to exclude the same benefit for other employees. Beyond the omission of free housing for deputy wardens, this legislative intent was also reflected in the new second paragraph of Section 218.14 (later codified at Section 246.305) which expressly required other employees to pay rent for any dwelling furnished to them, and by the concurrent repeal of Section 246.7, a repeal which must be viewed in pari materia with the amendment to Section 218.14 contained in the same enactment.

Section 246.3 stated a general authority to fix salaries or compensation for correctional institution employees. After 1980, Sections 218.14, and later 246.305, were specific, or special, statutes pertaining to the furnishing of free housing or subsistence payments to department employees as a part of their compensation. "It is a fundamental rule of statutory construction that where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special

statute will be considered an exception to or a qualification of the general statute and will prevail over it, whether it was passed before or after such general enactment. State v. Perry, 440 N.W.2d 389, 390 (Iowa 1989).

After 1980 there was no authority to provide subsistence payments to deputy wardens. The Court understands and appreciates the reasons which underlay the "grandfather" decision. The termination of a long-benefit held/is poor reward for long years of public service. But, if the result was seen as harsh, the remedy lay in other forms of authorized consideration, and indeed a salary adjustment was mentioned in Sissel's case and was suggested as an alternative for all three Petitioners at about the time the subsistence payments were terminated. (Exhibits 12, 16, B, G). Nothing in the legislation of 1980 prohibits a base salary increase to redress the hardship caused by statutory elimination of a part of the deputy wardens' compensation package. What could not be done was to continue the very thing the legislature had rescinded.

Petitioners next argue that the 1980 changes in the law should be applied prospectively. The Court agrees the statute is to be applied prospectively in the sense that Sections 218.14 and 246.305 govern the furnishing of dwelling houses or payment in lieu thereof to correctional employees after July, 1980. The Court does not agree, however, that prospective application means the statute applies only to employees hired in the future. There is nothing in the language of the 1980 enactment which indicates the changes in the law were meant to apply only to subsequent employees. The repeal of Section 246.7 made the law as if the section had never existed. Woman Aware v. Reagan, 331 N.W.2d 88, 91 (Iowa 1983).

Had the legislature wanted to "grandfather in" existing employees, it could have done so, but it did not. Further, the right to receive housing, or payment in lieu thereof, in Section 246.7 was a statutory, not a vested right, and as such could be taken away by legislative enactment.² See Kemp v. Day & Zimmerman, 239 Iowa 829, 861-862, 33 N.W.2d 569, 586 (1948). See also Brightman v. Civil Service Commission, 204 N.W.2d 588, 591 (Iowa 1973).

In view of the fact the subsistence and rent reimbursement payments to Petitioners after 1980 were not authorized by, and were inconsistent with, Sections 218.14 and 246.305, Iowa Code, their discontinuance by IDOP did not violate Section 19A.1(2).

Lastly, Petitioners argue the discontinuance of their subsistence pay violated the IDOP "red-circling" rule, Rule 4.5(17). Under current regulations a "red-circled" salary is one which exceeds the maximum for the pay grade in the pay plan to which the employee is assigned. The apparent purpose is to avoid reduction in pay for employees who are reassigned to different pay grades. There are a number of reasons why the "red-circling" rule does not apply here. First, Petitioners were never red-circled under the rule, rather, they argue the receipt of subsistence compensation by them constituted a "de facto" form of red-circling. Petitioner's Brief at 8. Indeed, the rule in effect in the early

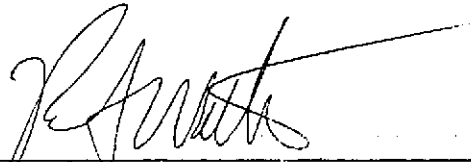
2. At the time all three Petitioners were offered the position as deputy warden they were told the position included the benefits then codified in Section 246.7, Iowa Code. This was a term and condition of their employment at that time, but was nonetheless a matter of statutory entitlement.

1980s, 570 I.A.C. 4.5(8) applied only to employees assigned to different pay grades, which did not occur here. Second, a red-circled rate of pay is one that is frozen at a particular pay rate unless increase is specifically authorized by legislative enactment. 581 I.A.C. 4.5(16). Petitioners' pay has not been frozen, as they have continued to receive periodic merit and cost-of-living adjustment salary increases. Finally, compensation which is not permitted by statute cannot be "red-circled" by administrative rule so as to perpetuate a violation of law. Whatever the "red-circling" rule may provide, it does not prevail over statutory limitations on compensation.

In view of the foregoing, the Court concludes Petitioners have failed to establish any ground for relief alleged in their Petition and, accordingly, the Agency action in question should be AFFIRMED.

IT IS SO ORDERED.

Dated at Des Moines, Iowa this ^{12th} 10th day of November, 1992.



Ross A. Walters, Judge
Fifth Judicial District

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